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4 UNITED STATES DISTRICT COURT  
5 EASTERN DISTRICT OF CALIFORNIA

6 LION RAISINS, INC.,

7 Plaintiff,

8 v.

9 UNITED STATES DEPARTMENT OF  
10 AGRICULTURE,

11 Defendant.

1:08-CV-00358-OWW-SMS

MEMORANDUM DECISION AND  
ORDER RE PLAINTIFF'S MOTION  
FOR DISCOVERY

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13 I. INTRODUCTION

14 Before the court is a "motion for discovery" brought by  
15 Plaintiff Lion Raisins, Inc. ("Lion") pursuant to Federal Rules of  
16 Civil Procedure 26 and 56(f)(2).<sup>1</sup> Lion seeks discovery in  
17 connection with various requests it made, under the Freedom of  
18 Information Act ("FOIA"), 5 U.S.C. § 552, for records of the United  
19 States Department of Agriculture ("USDA"). The court heard oral  
20 argument on the motion on January 16, 2009. For the reasons  
21 discussed below, Lion's motion for discovery is denied.

22 II. DISCUSSION AND ANALYSIS

23 A. Lion's Motion Under Rule 56(f)(2)

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25 <sup>1</sup> After filing its principal brief in support of its motion,  
26 Lion submitted a supplemental memorandum of points and authorities  
27 (Doc. 22). Lion also submitted a twenty-four-page supplemental  
28 declaration (Doc. 21), and then later a "further" declaration (Doc.  
22-2). Lion motioned for approval of its supplementation (Doc.  
22), and the court grants this motion.

1 The USDA has not yet moved for summary judgment in this case.  
2 Accordingly, Lion's motion under Rule 56(f) (2) is premature and, on  
3 that basis, is denied. See *Pabaon Osvaldo v. U.S. Penitentiary*  
4 *Lewisburg Warden*, No. Civ. 3:CV-05-155, 2006 WL 485574, at \*4 n.6  
5 (M.D. Pa. Feb. 28, 2006) ("Plaintiff's motion is not properly made  
6 pursuant to Rule 56(f) as Defendants have not moved for summary  
7 judgment in this action."); *FEC v. Carlucci*, CIV. A. No. 87-1747,  
8 1988 WL 35378, at \*2 (D.D.C. Mar. 31, 1988) ("[P]laintiff cannot  
9 rely on Rule 56(f) because no motion for summary judgment is  
10 pending at this time."). When the USDA files a motion for summary  
11 judgment, Lion can move under Rule 56(f)(2) and attempt to  
12 establish that discovery is warranted under this rule.

13 B. Lion's Motion Under Rule 26

14 1. Local Rule 37-251

15 Lion also moves for discovery under Rule 26, and such motions  
16 are subject to the meet and confer requirements of Local Rule 37-  
17 251, with which Lion did not comply. Non-compliance with Local  
18 Rule 37-251 typically results in a denial of the discovery motion.  
19 See, e.g., *Peyton v. Burdick*, No. 07-cv-0453 LJO TAG, 2008 WL  
20 880573, at \*1 (E.D. Cal. Mar. 31, 2008) ("Plaintiff's motion is not  
21 accompanied by a certification or an affidavit indicating that he  
22 conferred with Defendants' counsel and attempted to resolve this  
23 discovery dispute without resorting to filing a motion.  
24 Accordingly, Plaintiff's motion to compel discovery fails to comply  
25 with FRCP 37(a)(1) and L.R. [3]7-251, and must be denied.");  
26 *Abubakar v. City of Solano*, No. CIV S-06-2268 LKK EFB, 2008 WL  
27 508911, at \*3 (E.D. Cal. Feb. 22, 2008) (denying a discovery motion  
28 without prejudice to extent it dealt with discovery issues over

1 which the parties did not "meet and confer" as required by Local  
2 Rule 37-251). When questioned by the court whether there was a  
3 reason why Lion did not comply with the Local Rules, Lion offered  
4 no reason for its non-compliance. Lion was allowed to present oral  
5 argument on its motion nonetheless, and, after hearing from both  
6 parties, it was apparent that granting Lion's motion and permitting  
7 discovery at this time would be inappropriate.<sup>2</sup>

## 8 2. Discovery In FOIA Cases

9 In a FOIA case, like in others, "[a] district court has wide  
10 latitude in controlling discovery, and its rulings will not be  
11 overturned in absence of a clear abuse of discretion." *Lane v.*  
12 *Dep't of Interior*, 523 F.3d 1128, 1134 (9th Cir. 2008) (internal  
13 quotation marks omitted). Given that *Lane* explicitly recognized  
14 that a district has "wide latitude in controlling discovery" in a  
15 FOIA case, it is indisputable that discovery is permissible in a  
16 FOIA case (otherwise there would be no latitude). Although  
17 discovery is permissible in a FOIA case, "discovery is limited  
18 because the underlying case revolves around the propriety of  
19 revealing certain documents. Accordingly, in these cases courts  
20 may allow the government to move for summary judgment before the  
21 plaintiff conducts discovery." *Lane*, 523 F.3d at 1134 (citation  
22 omitted).

23 FOIA cases are usually decided at the summary judgment stage.  
24 *Lawyers' Comm. for Civil Rights of S.F. Bay Area v. U.S. Dep't of*  
25 *the Treasury*, 534 F. Supp. 2d 1126, 1131 (N.D. Cal. 2008)  
26 ("Procedurally, district courts typically decide FOIA cases on

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28 <sup>2</sup> Future compliance with the Local Rules is expected.

1 summary judgment before a plaintiff can conduct discovery.");  
2 *Sakamoto v. EPA*, 443 F. Supp. 2d 1182, 1188 (N.D. Cal. 2006) ("It  
3 is generally recognized that summary judgment is a proper avenue  
4 for resolving a FOIA claim."). At the summary judgment stage, the  
5 government is often the moving party and ordinarily it submits  
6 affidavits and argument to establish the applicability of an  
7 exemption as to withheld records, the adequacy of its search for  
8 responsive records, and any other matters necessary to support the  
9 motion. To obtain summary judgment in its favor, the government  
10 must establish that an exemption applies as to withheld documents,  
11 *Dobronski v. FCC*, 17 F.3d 275, 277 (9th Cir. 1994), and that its  
12 search for responsive records was adequate, *Zemansky v. EPA*, 767  
13 F.2d 569, 571-73 (9th Cir. 1985). See also *U.S. Dep't of Justice*  
14 *v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 755  
15 (1989) ("Unlike the review of other agency action that must be  
16 upheld if supported by substantial evidence and not arbitrary or  
17 capricious, the FOIA expressly places the burden 'on the agency to  
18 sustain its action' and directs the district courts to 'determine  
19 the matter de novo.'" (quoting 5 U.S.C. § 552(a)(4)(B)). If the  
20 government affidavits submitted in connection with a motion for  
21 summary judgment are sufficient to meet the government's burden,  
22 the case can be decided without discovery. See *Lane*, 523 F.3d at  
23 1125-36; *Citizens Comm'n on Human Rights v. FDA*, 45 F.3d 1325, 1329  
24 (9th Cir. 1995).

25 After a government defendant has moved for summary judgment in  
26 a FOIA case and submitted its supporting affidavits, some courts  
27 have permitted, or have indicated a willingness to permit, certain  
28 discovery relating to the exemption(s) claimed and/or the adequacy

1 of the search when the plaintiff impugns the government affidavits  
2 with evidence of bad faith or when some other deficiency renders  
3 the affidavits insufficient. See, e.g., *Carney v. U.S. Dep't of*  
4 *Justice*, 19 F.3d 807, 812 (2nd Cir. 1994) (noting that "discovery  
5 relating to the agency's search and the exemptions it claims for  
6 withholding records generally is unnecessary if the agency's  
7 [summary judgment] submissions are adequate on their face[,] and  
8 "[i]n order to justify discovery once the agency has satisfied its  
9 burden [on summary judgment], the plaintiff must make a showing of  
10 bad faith on the part of the agency sufficient to impugn the  
11 agency's affidavits or declarations . . . or provide some tangible  
12 evidence that an exemption claimed by the agency should not apply  
13 or summary judgment is otherwise inappropriate."); *Van Strum v.*  
14 *EPA*, 680 F. Supp. 349, 352 (D. Or. 1987) (permitting discovery in  
15 a FOIA case, stating "[s]ummary judgment without discovery is  
16 appropriate where the plaintiff has made no showing of agency bad  
17 faith sufficient to impugn the agency affidavit[,] but "where  
18 plaintiff or the agency's response raises serious doubts as to the  
19 completeness and good faith of the agency's search, discovery is  
20 appropriate"); *Exxon Corp. v. FTC*, 466 F. Supp. 1088, 1094 (D.D.C.  
21 1978) (noting, in a FOIA case, that a "court should not, of course,  
22 cut off discovery before a proper record has been developed; for  
23 example, where the agency's response raises serious doubts as to  
24 the completeness of the agency's search . . . where the agency's  
25 response is patently incomplete . . . or where the agency's  
26 response is for some other reason unsatisfactory"), *aff'd*, 663 F.2d

1 120 (D.C. Cir. 1980).<sup>3</sup> Even where discovery is allowed in a FOIA  
2 case, it is limited. *Lane*, 523 F.3d at 1134; *Giza v. Sec'y of*  
3 *Health, Educ. & Welfare*, 628 F.2d 748, 751 (1st Cir. 1980) ("To the  
4 extent that discovery is allowed in a[] FOIA action, it is directed  
5 at determining whether complete disclosure has been made, e.g.,  
6 whether a thorough search for documents has taken place, whether  
7 withheld items are exempt from disclosure."); *Lawyers' Comm. for*  
8 *Civil Rights*, 534 F. Supp. 2d at 1131-32 (noting that in FOIA cases  
9 discovery is "sparingly granted, and is most often limited to  
10 investigating the scope of the agency search for responsive  
11 documents, the agency's indexing procedures, and the like")  
12 (internal quotation marks omitted); *Van Strum*, 680 F. Supp. at 352  
13 ("In general, the scope of discovery in a[] FOIA case is limited to  
14 whether complete disclosure has been made by the agency in response  
15 to the request for information").<sup>4</sup> Although the government often  
16 moves for summary judgment in a FOIA case, a plaintiff can also  
17 move or cross-move for summary judgment or summary adjudication.  
18 See, e.g., *Van Bourg, Allen, Weinberg & Roger v. NLRB*, 751 F.2d  
19 982, 984 (9th Cir. 1985); *Van Strum*, 680 F. Supp. at 350.

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21 <sup>3</sup> At least one court has also permitted discovery relating to  
22 a plaintiff's FOIA claim for a "pattern and practice of untimely  
23 responses to FOIA requests." *Gilmore v. U.S. Dep't of Energy*, 33 F.  
24 Supp. 2d 1184, 1188, 1190 (N.D. Cal. 1998). The discovery was  
25 limited to the Department of Energy's "policies and practices for  
26 responding to FOIA requests, and the resources allocated to ensure  
27 its compliance with the FOIA time limitations." *Id.* at 1190. No  
28 such discovery is sought here.

26 <sup>4</sup> As an alternative to permitting discovery, if the government  
27 affidavits are insufficient, a court can order the government to  
28 submit additional affidavits. See *Pollard v. FBI*, 705 F.2d 1151,  
1154 (9th Cir. 1983).

1 Here, Lion has submitted affidavits and argument in an attempt  
2 to show bad faith and other misconduct on the part of the USDA in  
3 hopes of demonstrating that discovery should be allowed. Lion's  
4 motion for discovery, which is factually detailed, touches upon the  
5 USDA's responses to Lion's FOIA requests, the applicability of FOIA  
6 exemptions and the agency's search for records. In other words,  
7 Lion has submitted evidence and argument in its motion for  
8 discovery that, in a FOIA case, would normally be advanced at the  
9 summary judgment stage. The USDA has responded to Lion's motion  
10 with only legal argument as to the propriety or impropriety of  
11 discovery in FOIA cases, and the USDA contends that a decision as  
12 to discovery should be made only after the USDA files its motion  
13 for summary judgment. The USDA has not supplied affidavits or  
14 briefing regarding its responses to the FOIA requests, any claimed  
15 exemptions, the searches conducted, or other substantive matters  
16 that might bear on the disposition of this case. Without the  
17 USDA's position and evidence on substantive matters pertinent to  
18 disposition of this case (e.g., the extent of its search for  
19 responsive records), there is not enough information to  
20 conclusively determine, at this time, whether or to what extent  
21 discovery should be permitted, or whether this case or particular  
22 issues can be properly decided without discovery. See *Murphy v.*  
23 *FBI*, 490 F. Supp. 1134, 1137 (D.D.C. 1980) ("[C]ases uniformly  
24 establish that discovery may proceed in a FOIA controversy when a  
25 factual issue arises concerning the adequacy or completeness of the  
26 government search and index. But they further establish a  
27 self-evident principle: a factual issue that is properly the  
28 subject of discovery can arise only after the government files its

1 affidavits and supporting memorandum of law.").

2 Rather than engage in an unproductive exercise of directing  
3 the USDA to respond to Lion's discovery motion with more  
4 information, and given that Lion's discovery motion contains  
5 evidence and argument that is typically advanced at the summary  
6 judgment stage, the previously set deadline (May 18, 2009) for  
7 summary judgment motions (Doc. 13 at p.7.) is advanced. Such  
8 motions, from either party, shall be filed by March 2, 2009.  
9 Opposition to such motions shall be filed by March 16, 2009.  
10 Replies thereto shall be filed by March 23, 2009. The motion(s)  
11 will be heard on March 30, 2009, at 10:00 a.m. In the interest of  
12 efficiency, the parties may incorporate by reference any affidavits  
13 or briefing submitted in connection with Lion's motion for  
14 discovery.

15 For the foregoing reasons, Lion's motion for discovery is  
16 denied.

17 IT IS SO ORDERED.

18 Dated: January 21, 2009

/s/ Oliver W. Wanger  
UNITED STATES DISTRICT JUDGE